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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 73-54

THOMAS A. DONELON, CHARLES J. EAGAN, JR., ANTON PILNEY, GEORGE ACKEL, JACOB H. SCIAMBRA, CHARLES M. MILLER, BEAUREGARD H. MILLER, JR., HAROLD L. MOLAISON, HARRISON SCHOUEST and THE PARISH OF JEFFERSON

Petitioners

VS.

NEW ORLEANS TERMINAL COMPANY and FEDERAL RAILROAD ADMINISTRATION OF THE DEPARTMENT OF TRANSPORTATION

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

NATHAN GREENBERG
GREENBERG, COHEN & DALLAM
848 Second Street
Gretna, Louisiana

ATTORNEY FOR PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO.

THOMAS A. DONELON, CHARLES J. EAGAN, JR., ANTON PILNEY, GEORGE ACKEL, JACOB H. SCIAMBRA, CHARLES M. MILLER, BEAUREGARD H. MILLER, JR., HAROLD L. MOLAISON, HARRISON SCHOUEST and THE PARISH OF JEFFERSON

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

The instant application for a writ of certiorari or review is filed herein by Thomas A. Donelon, Charles J. Eagan, Jr., Anton Pilney, George Ackel, Jacob H. Sciambra, Charles M. Miller, Beauregard H. Miller, Jr., Harold L. Molaison, Harrison Schouest and the Parish of Jefferson, following the decision

of the Honorable U. S. Court of Appeals, Fifth Circuit, rendered on March 12, 1973, affirming the judgment of the Honorable U. S. District Court for the Eastern District of Louisiana, Division H.

An application for rehearing was timely filed and was denied on April 4, 1973.

LOWER COURT OPINIONS

The opinion of the Trial Court is unreported.

The opinion of the Court of Appeal, Fifth Circuit, is found at 474 F. 2d 1108 (5th Cir., 1972).

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1254 and Section 1651, seeking to review the judgment of the Honorable U. S. Court of Appeal, Fifth Circuit, rendered on March 12, 1973. An application for rehearing, timely filed, was denied on April 4, 1973. This application for writ of certiorari or review is timely under the provisions of 28 United States Code, Section 2101 (c).

PRINCIPLES AND STATUTES INVOLVED

The principles here involved are:

(1) The extent to which a local governing authority may enforce compliance of railroads operating within the jurisdiction of the local authority to properly maintain and repair railroad tracks and other railroad facilities;

(2) The extent to which a federal district court may enjoin proceedings in a Louisiana state district court.

The statutes herein involved are:

(1) 28 U.S. Code, Sections 421-441, commonly referred to as the Federal Railroad Safety Act of 1970; and

(2) 28 U.S. Code, Section 2283, commonly referred to as the Federal Anti-Injunction Statute.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

(1) Whether a local governing authority may enforce compliance of railroads to properly maintain and repair railroad tracks and facilities in view of the Federal Railroad Safety Act of 1970;

(2) Whether the trial court erred in issuing an injunction restraining the prosecution of a state court civil proceeding in the nature of a mandatory injunction before the Twenty-Fourth Judicial District Court for the parish of Jefferson, State of Louisiana, wherein the Parish of Jefferson and its elected officials sought to compel New Orleans Terminal to properly maintain and repair its tracks and other facilities.

STATEMENT OF THE CASE

Thomas A. Donelon, Parish President of the Parish of Jefferson, Charles J. Eagan, Jr., Anton Pilney, George Ackel, Jacob H. Sciambra, Charles M. Miller, Beauregard H. Miller, Jr., and Harold L. Molaison, Councilmen of the Parish of Jefferson, Harrison Schouest, Director of Safety of the Parish of Jefferson, and the Parish of Jefferson, a political subdivision of the State of Louisiana, filed suit in the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, on October 27, 1970, against New Orleans Terminal Company, hereinafter sometimes referred to as "NOT" seeking a preliminary and permanent injunction concerning the lack of proper maintenance and repair of NOT's tracks and facilities in the Metairie area of the Parish of Jefferson, which tracks extend between Metairie Road and Shrewsbury in Jefferson Parish, a heavily populated area. Although plaintiffs' action refers to alleged unsafe and hazardous conditions of the trackage, the primary thrust of the action is the alleged lack of proper maintenance and repair of the tracks and roadbeds. The original action filed in the Twenty-Fourth Judicial District Court for the Parish of Jefferson bears Docket No. 130-612 and is labelled Exhibit "B" annexed to the complaint for review (A. 18-34) and was filed shortly after two train derailments on the said tracks within a period of thirty days.

On November 19, 1970, NOT filed a petition for removal of the said action to the U. S. District Court for the Eastern District of Louisiana, Civil Action No. 70-3258, labelled Exhibit "C" (A. 35-39). A motion to remand was granted by the federal district court on January 4, 1971.

On January 15, 1971, NOT filed a petition with the Secretary of Transportation of the United States Department of Transportation seeking to commence proceedings to test, inspect and investigate the condition of the trackage, road-bed and facilities of NOT in the Parish of Jefferson, State of Louisiana, and to make a determination that the said NOT facilities are in a safe and proper condition. The petition is labelled Exhibit "D" (A. 42-47).

In the latter part of January 1971 petitioners herein filed an exception to the proceedings before the Secretary of Transportation contending that the proceeding was improper and not in accord with Section 203 of the Federal Railroad Safety Act (45 U.S.C. §432) in that the NOT petition sought an adjudication or determination that the tracks, roadbeds and other facilities were in a safe and proper condition, and not an adjudication related to emergency powers for determination of an unsafe condition as required by Section 203 of the Federal Railroad Safety Act of 1970 (A. 48-49).

On March 16, 1971, the Federal Railroad Administration of the Department of Transportation in proceedings bearing Docket No. FRA-Pet. No. 25, issued its "report" setting forth findings and determinations and concluding that the controversy probably falls within the scope of the Federal Railroad Safety Act of 1970. The Report concluded that the NOT tracks, railbeds and facilities in Jefferson Parish are in a safe and suitable condition for operations. The "Report" is labelled Exhibit "A" in the record. (A. 7-17).

Petitioners herein filed a complaint on April 2, 1971, in the U. S. District Court for

the Eastern District of Louisiana, Civil Action No. 71-918 (A. 1-7) seeking review of the order or Report of the Federal Railroad Administration under the Administrative Procedure Act. NOT answered the complaint and filed a counterclaim for a declaratory judgment that the Report of the Federal Railroad Administration was valid and binding upon petitioners and also decreeing that the Parish of Jefferson and its officials had no jurisdiction, power and authority to prescribe and establish and enforce by injunctive relief standards, rules and regulations for the maintenance and inspection of NOT's tracks and rail facilities in Jefferson Parish (A. 51-65).

On November 5, 1971, NOT filed a motion for partial summary judgment on its counterclaim (A. 71-79). Notwithstanding an opposition to the motion filed by petitioners herein, the motion for partial summary judgment was granted on December 15, 1971. Petitioners filed a motion for new trial and/or rehearing (A. 143-146) and also amended the complaint.

NOT filed a motion for preliminary injunction seeking to restrain the Parish of Jefferson and its officials from further prosecution of the original suit filed in the state court, a motion for entry of final judgment of the court's ruling of December 15, 1971 pursuant to Rule 54 (b), Federal Rules of Civil Procedure, and an ex-parte motion and order permitting short notice of hearing of the motions, (A. 159, 172, 175).

All then pending motions were heard on January 26, 1972 at which time the U. S. District Court denied the application for new trial, granted the preliminary injunction and further certified as a final judgment under Rule 54 (b) its ruling of December 15, 1971.

Thereafter, supplemental findings of fact and conclusions of law were entered restraining and enjoining the Parish of Jefferson and its officials from further prosecution of the state court proceeding (A. 180-184).

ARGUMENT

I

WHETHER A LOCAL GOVERNING AUTHORITY MAY ENFORCE COMPLIANCE OF RAILROADS TO PROPERLY MAINTAIN AND REPAIR RAILROAD TRACKS AND FACILITIES IN VIEW OF THE FEDERAL RAILROAD SAFETY ACT OF 1970.

The litigation between the Parish of Jefferson and NOT originally began in the Louisiana state court as a proceeding for a mandatory injunction to compel the railroad to properly maintain and repair its tracks and facilities within the confines of Jefferson Parish. This action was prompted by virtue of two train derailments within a month in the area of Metairie, Louisiana, a heavily populated and much traveled suburb of the City of New Orleans, Louisiana. The Parish of Jefferson and its officials acted in pursuance of their police powers to preserve the health, safety and welfare of those who live, work and travel in the vicinity of the tracks as well as those who would be adversely affected by any breakdown which would tie up traffic along several highways and major thoroughfares which are traversed by the tracks.

The Court of Appeal for the Fifth Circuit held, in essence, that the Parish of Jefferson and its officials are improper parties plaintiff (i.e., have not stated a right of

action) in view of the provisions of 45 U.S.C., §434, the Federal Railroad Safety Act of 1970, providing that rules, regulations and standards relating to railroads shall be uniform to the extent practicable, but further providing that the States could continue in force additional or more stringent rules, regulation, etc., necessary to correct or eliminate an essentially local hazard as long as the state action was not in conflict with any federal action and was not unduly burdensome to interstate commerce. The Court of Appeal held that local officials have no interest in railroad safety which is not pre-empted by the Federal Railroad Safety Act. The Court of Appeal further held that the word "state" as used in 45 U.S.C., §434 refers solely to the State of Louisiana, and not to any state agency, political subdivision or municipality. For example, the Court of Appeal mentioned in dicta that the Attorney General for the State of Louisiana might bring a suit to enjoin unsafe rail practices, and that the state legislature could establish standards.

It is respectfully submitted that the Honorable Court of Appeal for the Fifth Circuit has fallen into error in several respects:

First, Section 434 of Title 45 only declares that rules, regulations, etc., relating to railroad safety be nationally uniform, it does not prohibit any individual or body from suing a railroad to enforce compliance with any rules and regulations. Nowhere in the history of this litigation have the Parish of Jefferson and its officials sought to promulgate or enforce any rules, standards and regulations against NOT or any other railroad. To the extent that the federal government has regulated railroad safety, the railroad may be forced into compliance with those standards.

Historically and traditionally the regulation of health, safety and welfare, the so-called police powers, has been left to local governing authority. It is in furtherance of this exercise of the police power that this litigation was originally commenced. Nothing in the Federal Railroad Safety Act prevents compliance with reasonable and proper repair and maintenance of tracks and facilities.

The Court below erred in construing the litigation of the Parish of Jefferson as an attempt to enforce its own rules and regulations when in fact there are no particular rules and regulations which the Parish of Jefferson seeks to have enforced, except that NOT should properly repair and maintain its tracks and facilities.

Second, the Court of Appeal erred in too narrowly construing "State" in Section 434 of the Federal Railroad Safety Act so as to eliminate completely any and all action of municipal or local governing authorities. It is respectfully submitted that although not specifically spelled out in the act, the use of the word "State" in Section 434 necessarily includes municipal and local governing authorities for the reason that "state" action is intended to cover essentially "local" situations. See Griffin v. Colusa County, 44 Cal. App. 2d 915, 113 P. 2d 270; State ex rel Great Falls Housing Authority v. City of Great Falls, 110 Mont. 318,100 P. 2d 915. In an analogous act of the Congress, the National Gas Pipeline Safety Act of 1968, 49 U.S.C., §1671, et seq., as interpreted by the Court of Appeal, Fifth Circuit, it has been held that the Parish of Terrebonne may impose reasonable, and non-conflicting restrictions and regulations upon the construction and operation of a gas transmission pipeline, notwithstanding federal

pre-emption. See United Gas Pipe Line Co. v. Terrebonne Parish Police Jury, 319 F. Supp. 1138 (E.D. La., 1970); aff'd 445 F.2d 301 (5th Cir., 1971).

The word "State" has frequently been interpreted to refer to state agencies in tax cases (State Ins. Fund v. Boyland, 125 N.Y.S. 2d 169) civil rights cases (Exparte Powers, 129 Fed. 985) and others (DesMoines City R. Co. v. Des Moines, 151 Fed. 854). The Fifth Circuit has given no compelling reason for its narrow construction of the word "State" in this section of the act; indeed none exists.

Although Section 205 of the Federal Railroad Safety Act of 1970 indicates that a "State" may adopt or continue in force an additional or stringent law,rule, or regulation relative to railroad safety, when essential to eliminate a local safety hazard, many states cannot legislatewith reference to a small local area of the individual state. For example, in Louisiana, Article 4, Section 4 of the Louisiana Constitution provides:

> "The Legislature shall not pass any local or special law on the following specified subjects:
>
> * * *
>
> Authorizing the laying out, opening, closing, altering or maintaining roads, highways, streets or alleys, or relating to ferries and bridges, or incorporating bridge or ferry companies, except for the erection of bridges crossing streams which form boundaries between this and any other State.
>
> * * *

Authorizing the constructing of street passenger railroads in any incorporated town or city.

* * * *

Should the word "State" be interpreted as the Honorable Fifth Circuit has indicated that it should in this case, such an interpretation would make legislation at the state level unconstitutional in Louisiana. We believe that such a situation would also result in other states as well as in the State of Louisiana.

The statutory scheme of the Federal Railroad Safety Act, and especially Section 434 of Title 45 U.S. Code, is to allow for correction of particular and peculiarly local safety hazards at something less than the Federal level. The precise wording of the Act is at the "State" level, but it is submitted that this must be interpreted to include state agencies such as local governing authorities. Vitality can be given to this section of the Act only by construing "State" to include such state agencies, for indeed in the State of Louisiana it is unconstitutional for the state to legislate with respect to only one small local situation which does not affect any other area of the state. Louisiana Constitution, 1921, Art. 4, §4.

It is submitted that in view of the obvious similarity of purpose between the Railroad Safety and Gas Pipeline Safety Acts that the reference to "State" in §434 of the Railroad Safety Act should be construed to include local governing authorities as in the Gas Pipeline Safety Act, so that local safety hazards can be dealt with on the local level. It is further submitted that state action must

be considered to encompass action by state agencies including local governing authorities so that states, such as Louisiana, having restrictions on the passage of local area laws by the state legislature will not be prohibited from availing themselves of the provisions of 45 U.S.C., §434.

II

WHETHER THE TRIAL COURT ERRED IN ISSUING AN INJUNCTION RESTRAINING THE PROSECUTION OF A STATE COURT CIVIL PROCEEDING IN THE NATURE OF A MANDATORY INJUNCTION BEFORE THE TWENTY-FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA, WHEREIN THE PARISH OF JEFFERSON AND ITS ELECTED OFFICIALS SOUGHT TO COMPEL NOT TO PROPERLY MAINTAIN AND REPAIR ITS TRACKS AND OTHER FACILITIES

At the same time that the District Court maintained NOT's motion for partial summary judgment on its counterclaim, the District Court also enjoined petitioners herein from further prosecution of their state court litigation against NOT, relying upon two of the three exceptions to the Federal Anti-Injunction Statute, 28 U.S.C., §2283, namely that the injunction was necessary to protect the jurisdiction of the Court and of the Department of Transportation and also to protect and effectuate the judgment of the Court on the motion for partial summary judgment.

The Fifth Circuit Court of Appeal affirmed on the basis of its recent decisions in Tampa Phosphate Railroad v. Seaboard Coast Line Railroad, 418 F.2d 387 (5th Cir., 1969) and Woods Exploration & Production Co. v. Aluminum

Company of America, 438 F.2d 1286 (5th Cir., 1971) holding that the District Court's judgment on the partial summary judgment on NOT's counterclaim, as made final by the Rule 54 (b) certification, was res judicata of the state court proceedings and that a federal court could enjoin state court proceedings which were precluded under the doctrine of res judicata.

It is clear that for the doctrine of res judicata to apply, the judgment urged in bar "must be a final judgment not only with respect to that aspect of the doctrine precluding the relitigation of the same cause of action, but also with respect to that aspect precluding the relitigation of identical issues." 46 Am. Jur. 2d verbo Judgments, §457, p. 626-627; Hoag v. New Jersey, 356 U. S. 464, 78 S.Ct. 829. The issue is whether a judgment rendered is final and available as a res judicata defense as of the day it is rendered and before there is opportunity for a new trial, appeal, writ or other post judgment relief. At least until the delays for new trial have elapsed, the judgment is subject to change by the very tribunal which issued it. In the instant case the motion to make the summary judgment final under Rule 54 (b) was heard and granted on the very same day that the motion for new trial was heard and denied and the motion for preliminary injunction was heard and granted. And the injunction was granted on the basis of the res judicata nature of the summary judgment.

The finality of a judgment does not so much refer to its being res judicata of any other issue but instead refers to its being appealable, i.e., it is final as opposed to interlocutory. 46 Am. Jur. 2d Verbo Judgments,

§ 457, p. 627. This is precisely the purpose of a Rule 54 (b) certification of final (appealable, not interlocutory) judgment. In Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 76 S.Ct. 895 (1956) it was held that

> "It (Rule 54 (b) certification) does not relax the finality required of each decision, as an individual claim, to render it appealable, but it does provide a practical means of permitting an appeal to be taken from one or more final decisions on individual claims, in multiple claims actions, without waiting for final decision to be rendered on all the claims in the case . . .
>
> * * *
>
> ". . . A party adversely affected by a final decision thus knows that his time for appeal will not run against him until this certification has been made."

This distinction of final from interlocutory for purposes of appeal is further seen in 28 U.S.C., §1291 and 1292. From this it is submitted that a judgment is not "final" for purposes of res judicata effect upon another pending lawsuit until it is no longer subject to appeal, for until such time the thing adjudged is not truly conclusive either of the subject matter of the judgment or of any other litigation.

Therefore the Court of Appeal erred as a matter of law in holding that the summary judgment which was certified as final under Rule 54 (b) for purposes of appeal is res adjudicata of the state court litigation. The

only finality imparted to the judgment by the Rule 54 (b) certification concerns delays for appeal.

REASONS FOR GRANTING THE WRIT

The Federal Railroad Safety Act of 1970 is recent legislation affecting the full scope railroad activity in every nook and cranny of these United States. The instant application for writ of certiorari presents to this Honorable Court one of its first opportunities to review and interpret this Act, and such a review, in light of the all-encompassing aspects of the Act, will have a far broader effect than merely the outcome of the litigation between the Parish of Jefferson and New Orleans Terminal.

To the extent that the Federal Railroad Safety Act authorizes a limited amount of state action (which we submit encompasses action by state agencies such as local governing authorities) it is necessary that some delineation be made as to the degree of state (i.e., state agency) activity contemplated by the otherwise federally pre-empting Act.

Another reason for granting the writ is to review the injunction of the state court proceedings by the Federal District Court in view of Justice Douglas' comments in Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971) in which the learned Justice reviewed the concept of Federalism and concluded:

> "This brief discussion should be enough to suggest some of the reasons which it has been perfectly natural for our cares to respect time and time again that the normal thing to do when federal courts are asked to enjoin

pending proceedings in state courts is not to issue such injunctions . . ." 91 S. Ct. at p. 750-751.

The notion of the Court of Appeal for the Fifth Circuit that a federal court judgment made final by virtue of a Rule 54 (b) certification is res judicata of pending state court litigation as of the moment the judgment is certified as final and before delays for new trial or appeal have elapsed is incorrect and does not support any exception to the Anti-Injunction Statute, 28 U.S.C., §2283 as applied to these proceedings.

WHEREFORE, petitioners, Thomas A. Donelon, Charles J. Eagan, Jr., Anton Pilney, George Ackel, Jacob H. Sciambra, Charles M. Miller, Beauregard H. Miller, Jr., Harold L. Molaison, Harrison Schouest and The Parish of Jefferson, pray that this Honorable Court issue a writ of certiorari directed to the Hon. Judges of the U. S. Court of Appeal, Fifth Circuit, commanding them to send to this Court the necessary certified copies of the proceedings entitled "Thomas A. Donelon, Charles J. Eagan, Jr., et al vs. New Orleans Terminal Company and Federal Railroad Administration of the Department of Transportation", Docket No. 72-1546 on the docket of said court and lately pending therein, to the end that their validity may be ascertained, and that after due proceedings a writ of certiorari issue herein, that the matter be reviewed, and that the judgment rendered herein decreeing that the Parish of Jefferson and its officials have no standing under the Federal Railroad Safety Act of 1970 to enforce compliance of New Orleans Terminal with reasonable and proper maintenance and repair of its tracks and facilities in the Parish of Jefferson and also the judgment enjoining the Parish of

Jefferson and its officials from prosecuting their pending state court litigation against NOT be reversed.

Petitioners further pray for all necessary writs and orders and decrees in the premises, and for all general and equitable relief.

Respectfully submitted

GREENBERG, COHEN & DALLAM
848 Second Street
Gretna, Louisiana
(504) 366-6491

By: _____
NATHAN GREENBERG
ATTORNEY FOR PETITIONERS

CERTIFICATE

I hereby certify that a copy of the above and foregoing petition on behalf of plaintiff has been mailed to Benjamin R. Slater of Monroe & Lemann, 1424 Whitney Building, New Orleans, Louisiana, Attorney for defendants, by postage prepaid, this 2nd day of July, 1973.

_____

EXHIBIT "A"

142

1V2.

...ED STATES DISTRICT COURT ... Jury demand date: 71-918

TITLE OF CASE	ATTORNEYS
THOMAS A. DONELON CHARLES J. CAGAN, JR. ANTON PILNEY GEORGE ACKEL JACOB H. SCHWABB CHARLES H. MILLER BEAUREGARD H. MILLER, Jr. HAROLD L. MOLAISON HARRISON SCHWEST and THE PARISH OF JEFFERSON vs NEW ORLEANS TERMINAL COMPANY FEDERAL RAILROAD ADMINISTRATION OF THE DEPARTMENT OF TRANSPORTATION	For plaintiff: [illegible] [illegible] [illegible] Gretna, La. 366-6191 FILED: 8/2/71 TRIAL REQUEST: 8/26/71 For defendant: Benjamin R. Slater, Jr., T.A. - 525-8181 [illegible] 1424 Whitney Bldg. 70130 FOR: NEW ORLEANS TERMINAL COMPANY Claude J. Aucoin, Jr. (Atty for Federal RA) U. S. Attorney's Office 500 St. Louis Street, NOLA 70130 527-2521 James Cannizaro

Dec. 15

WEDNESDAY, NOVEMBER 17, 1971

10:00 A.M.

MOTION OF DEFT., N. O. TERMINAL CO., FOR PARTIAL SUMMARY JUDGMENT
and
MOTION OF DEFT., FEDERAL RR ADMINISTRATION, TO DISMISS &/OR FOR SUMMARY JUDGMENT.

Argument.

IT IS ORDERED that motion of defendant, N. O. Terminal Company, for partial summary judgment is hereby, GRANTED.

IT IS ORDERED that motion of defendant, Federal Railroad Administration, to dismiss and/or for summary judgment is ruled on as follows:

1. Motion for summary judgment that the Court does not have jurisdiction over the Federal Railroad Administration of the Department of Transportation is GRANTED.

2. Motion for summary judgment that this Court does not have jurisdiction to review the March 16, 1971 order issued by the Federal Railroad Administration is DENIED.

3. Motion for summary judgment that the Acting Administrator did not exceed his statutory authority in issuing the March 16, 1971 report is GRANTED.

DEC 17 1971

(3)

FEE
PROCESS
X CHARGE
MOT.
X RECEIPT
CERTIFIED
DOCUMENT NO.

Exhibit "A"

EXHIBIT "B"

177

New Orleans, Louisiana, January 21st, 1972.

s/ R. Blake West
J U D G E

...o0o...

ORDER FOR FINAL JUDGMENT
UNDER RULE 54(b)

(Number and title omitted) (Filed: January 26, 1972)

Considering the motion of New Orleans Terminal Company for an order under Rule 54(b) of the Federal Rules of Civil Procedure, it appearing that there is no just reason for delay in the entry of judgment pursuant to the granting of Nnew Orleans Terminal Company's motion for partial summary judgment;

IT IS ORDERED AND DETERMINED that there is no just reason for delay in the entry of judgment granting New Orleans Terminal Company's motion for partial summary judgment on its counterclaim, and it is hereby directed that final judgment be entered herein, in favor of plaintiff-in-counterclaim, New Orleans Terminal Company, and against defendants-in-counterclaim, Thomas A. Donelon, Charles J. Eagan, Jr., Anton Pilney, George Ackel, Jacob H. Sciambra, Charles M. Miller, Beauregard H. Miller, Jr., Harold L. Molaison, Harrison Schouest and The Parish of Jefferson, declaring and decreeing that said defendants-in-counterclaim have no jurisdiction, power and authority to prescribe and establish, and enforce by injunctive relief, standard, rules and regulations for the maintenance and

Ex. "B"

inspection of New Orleans Terminal Company's tracks and rail facilities in the Parish of Jefferson, State of Louisiana.

New Orleans, Louisiana, January 26th, 1972.

s/ R. Blake West
UNITED STATES DISTRICT JUDGE

...oOo...

FINAL JUDGMENT

(Number and title omitted) (Filed: January 27, 1972)

The Court having on January 26th, 1972 granted the motion of New Orleans Terminal Company for an order pursuant to Rule 54(b);

Now, therefore, considering the direction of the Court as to entry of judgment, and considering the order of Court of January 26th, 1972 that there is no just reason for delay in the entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED, that there be final judgment in favor of plaintiff-in-counterclaim, New Orleans Terminal Company, and against defendants-in-counterclaim, Thomas A. Donelon, Charles J. Eagan, Jr., Anton Pilney, George Ackel, Jacob H. Sciambra, Charles M. Miller, Beauregard H. Miller, Jr., Harold L. Molaison, Harrison Schouest and The Parish of Jefferson, declaring and decreeing that said defendants-in-counterclaim have no jurisdiction, power and authority to prescribe and establish, and enforce by injunctive relief, standards, rules and regulations for the maintenance

and inspection of New Orleans Terminal Company's tracks and rail facilities in the Parish of Jefferson, State of Louisiana.

New Orleans, Louisiana this 27th day of January, 1972.

s/ Benjamin W. Reisch
BENJAMIN W. REISCH, Clerk

APPROVED AS TO FORM:

s/ R. Blake West
UNITED STATES DISTRICT JUDGE

EXHIBIT "C"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1546

THOMAS A. DONELON,
CHARLES J. EAGAN, JR., ET AL,
Plaintiffs-Appellants,

versus

NEW ORLEANS TERMINAL COMPANY and
FEDERAL RAILROAD ADMINISTRATION OF
THE DEPARTMENT OF TRANSPORTATION,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(March 12, 1973)

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

GOLDBERG, Circuit Judge: This is an appeal from the granting of a federal injunction prohibiting plaintiffs-appellants, various officials of the Parish of Jefferson, Louisiana [hereinafter the Parish Officials],

from proceeding with a state court suit in which they were attempting to obtain injunctive relief against the allegedly unsafe practices of defendant-appellee, the New Orleans Terminal Company [hereinafter the Railroad].[1] The Railroad filed a counterclaim in a related federal suit, which was also brought by the Parish Officials, and asked for a declaratory judgment that the Parish Officials were utterly without jurisdiction, power, or authority to prescribe, establish, or enforce standards and regulations for the maintenance and repair of the Railroad's roadbeds and tracks. The United States District Court granted the Railroad's motion for partial summary judgment as to the request for declaratory relief, certified that there was no just reason for delay in the entry of a final judgment regarding the partial summary judgment, *see* Rule 54(b), F.R.Civ.P., and issued a preliminary injunction against the Parish Officials pursuing their state court suit while the federal action continued. The only issues presently before us are (1) whether the granting of the partial summary judgment was proper, and (2) whether injunctive relief was appropriate in light of the Anti-Injunction Act, 28 U.S.C.A. § 2283. For the reasons stated herein, we affirm the trial court's holding on both points.

Although the procedural history of this controversy is unusually lengthy and complex, the importance of that history to our holding justifies our setting out the operative occurrences in some detail.

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[1]The Federal Railroad Administration of the Department of Transportation was also named as a defendant in the principal federal suit but is only a nominal party on this appeal.

August 4, 1970: The Jefferson Parish Council was concerned about the fact that two train derailments had occurred within the parish in the space of thirty days. The Council met and passed a resolution to initiate legal action to correct the allegedly dangerous conditions of railroad tracks, roadbeds, and other facilities in the parish.

October 16, 1970: The Federal Railroad Safety Act of 1970, 45 U.S.A. §§ 421-441, became effective.

October 27, 1970: The Parish Officials filed suit in Louisiana state court seeking injunctive relief requiring "proper repair and maintenance, of the New Orleans Terminal Company's tracks and roadbeds and enjoining all use of the tracks until repaired.

November 19, 1970: The New Orleans Terminal Company removed the action to federal court pursuant to 28 U.S.C.A. § 1441.

January 4, 1971: The federal court remanded the action to the state court.

January 15, 1971: The Railroad petitioned the Secretary of Transportation to conduct an inquiry into the condition of the Railroad's trackage, roadbed, and other facilities in Jefferson Parish and to declare them to be in safe and proper condition. The Railroad alleged in

its petition that the Federal Railroad Safety Act of 1970, particularly § 203 thereof, 45 U.S.C. § 432, conferred authority on the Secretary of Transportation to conduct such an inquiry and to issue the requested report. The Parish Officials filed exceptions with the Secretary of Transportation objecting to any investigation being held at the Railroad's request and urging that the petition be dismissed.

January 21, 1971: The Federal Railroad Administration of the Department of Transportation assumed jurisdiction of the controversy and conducted an inspection of the Railroad's facilities in Jefferson Parish.

February 19, 1971: The Railroad filed jurisdictional exceptions to the state court proceedings, alleging that federal jurisdiction was exclusive and that even under Louisiana law the Parish Officials were improper parties to bring such a suit.

March 16, 1971: The Federal Railroad Administration issued a report, F.R.A. Pet. No. 25 [hereinafter the Report], declaring that "this matter properly comes within the scope of the Federal Railroad Safety Act of 1970," setting forth detailed findings regarding the conditions of the Railroad's facilities in Jefferson Parish, and concluding that the trackage was properly maintained and was in a safe and suitable condition for daily operations.

April 2, 1971: The Parish Officials filed the instant suit in federal court. The petition was captioned "Petition for Review of an Order of an Administrative Agency of the United States," but it named as defendants both the Federal Railroad Administration and the Railroad. The suit basically sought a determination that the Federal Railroad Administration had no jurisdiction to act as it did, that the Administration denied the Parish Officials due process of law by refusing to grant them an adversary hearing before issuing the Report, and that the Report was null and void.

May 19, 1971: The Railroad answered the federal petition and counterclaimed for a declaratory judgment that (1) the Parish Officials had no jurisdiction to prescribe or enforce rules and regulations relating to the safety of operations of a railroad operating in interstate commerce, and (2) the Report was valid and binding.

October 16, 1971: Pursuant to the statutory mandate of § 202(e) of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 431(e), the Federal Railroad Administration adopted comprehensive federal "Track Safety Standards," 36 Fed. Reg. 20336-343, 49 C.F.R. § 213.1-213.241.

November 5, 1971: The Railroad filed a motion in the federal action for partial summary judgment. In essence, the Railroad asked for a

judgment that the area of establishing and enforcing railroad track safety standards was totally pre-empted by federal law and that the Parish Officials were totally without jurisdiction, power, or authority to establish or enforce railroad safety standards.

December 15, 1971: The federal court granted the Railroad's motion for partial summary judgment. Shortly thereafter, the state court set a hearing date as to the Parish Officials' state suit for injunctive relief against the Railroad.

January 21, 1972: The Railroad returned to federal court and asked for a preliminary injunction enjoining the Parish Officials from proceeding with their state court suit. After certifying the partial summary judgment under Rule 54(b), F.R.Civ.P., the United States District Court entered an order that "[T]he granting of a preliminary injunction against the prosecution of [the state court] suit ... is necessary to protect the jurisdiction of this Court and the Department of Transportation, and to protect and effectuate the [partial] judgment in favor of New Orleans Terminal Company. ..." The court then issued the injunction restraining the Parish Officials from taking any further steps against the Railroad other than by continuing its suit for judicial review of the Report.

We note at the outset of our analysis that there are two distinctive features about this case. First, this is an appeal from only a partial summary judgment, which was made final, and therefore appealable, by a Rule 54(b) certification. The entire federal court case has not yet been finally decided below — the action for review of the Report of the Federal Railroad Administration is continuing to be litigated. Furthermore, the orders entered to date by the district court clearly indicate that the court intends to re-examine the injunction against the state court proceedings at the time a final judgment is entered regarding the review of that Report. Secondly, appellants' posture on this appeal is perhaps unique. Appellants sought to have the state court settle the controversy — they filed the original suit in state court, and when the Railroad removed it to federal court, appellants were successful in obtaining a remand back to the state court. Had the matter ended there, the federal court would not have become involved in the dispute, for a remand order is not reviewable.[2] But appellants were not content to leave the entire case in state court. Apparently fearing that the Railroad could successfully use the Federal Railroad Administration's Report as a "defense" to the state suit, appellants themselves invoked the jurisdiction of the federal court by bringing suit to attack the Report. By naming the Railroad as a party defendant in that action, appellants called upon the federal court to resolve the differences between themselves and the Railroad. Their complaint is with the

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[2] *See* WRIGHT, FEDERAL COURTS § 41. The sole exception is where removal was sought under 28 U.S.C.A. § 1443. *See* 28 U.S.C.A. § 1447(d)

manner in which the federal court resolved the dispute they themselves asked it to resolve.

I. THE PARTIAL SUMMARY JUDGMENT

The basic thesis underlying the district court's granting of the partial summary judgment is that a federal regulatory scheme has pre-empted the field of railroad safety to the exclusion of whatever interest in regulating railroad safety these individuals might otherwise have had outside the Act. We are in complete agreement with that conclusion, and we are fortified in reaching that result by the fact that we have a clear declaration of Congressional intent on that point to guide us:

> "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not

creating an undue burden on interstate commerce."

45 U.S.C. § 434.

The meaning of the Congressional declaration is clear. The ultimate goal of the Act is to establish nationally uniform control of railroad safety, but the statute is not iron-clad. The Act specifically authorizes a narrow spectrum of deviation from national uniformity, and the issue here is whether appellants' state court suit falls within one of the permissible exceptions.

The first statutory "exception," which appears in the second sentence of § 434, is clearly inapplicable. Regulations covering the precise subject matter of the state court suit have been enacted, 36 Fed. Reg. 20336-343, 49 C.F.R. § 213.1-213.241, and those regulations are comprehensive in scope and detail.

Nor can the second "exception," which appears in the final sentence of § 434, be said to envision this particular action. Three tests must be met if a state regulation is to be justified under the second "exception":

(1) the state regulation or standard relating to railroad safety is necessary to eliminate or reduce an essentially local safety hazard, *see Washington v. Chicago, M., St. P. & P. RR.*, 1971, 79 Wash.2d 288, 484 P.2d 1146, *appeal dismissed*, 404 U.S. 804, 92

S.Ct. 108, 30 L.Ed.2d 36 (fire hazards along railroad rights-of-way);

(2) the local measure is not incompatible with any federal measure; and

(3) the local measure does not unduly burden interstate commerce.

We need not and do not decide whether those tests are here met, because in any event meeting those three conditions justifies only *State* action. This case is supported by *United Gas Pipeline Co. v. Terrebonne Parish Police Jury*, 1970, 319 F.Supp. 1138, *aff'd*, 5 Cir. 1971, 445 F.2d 301. That case concerned the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C.A. § 1671-1684, which provided a similarly limited "exception" for "*Any state agency.*" *Id.* § 1672(b). The Railroad Safety Act, however, speaks of an exception for "States," and we do not have before us an attempt by the State of Louisiana to regulate railroad safety; rather, we have before us individual officials of a parish government. Their remedy against unsafe railroad practices must fit within the borders of the federal Act and the enumerated qualifications and exceptions thereto.

We do not purport to suggest at this time that the State of Louisiana, acting through its Attorney General, could not bring this same common-law suit to enjoin unsafe railroad practices. Nor do we intimate here that the Louisiana legislature, or some duly delegated agency acting for the State, could not establish

standards under § 434's second exception. Lastly, we do not reach the issue of the extent to which the Act pre-empts State standards such as the common-law tests that appellants apparently seek to vindicate. *See Napier v. Atlantic Coast Line RR.*, 1926, 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432. None of those issues are now before us, and we hold only that these individual officials are without authority under the Federal Railroad Safety Act of 1970 to require the Railroad to meet any safety standard beyond those provided for in the national Act.

II. THE TEMPORARY INJUNCTION AGAINST STATE COURT PROCEEDINGS

Having decided that the district court correctly entered a judgment that appellants are without power to require the Railroad to meet any non-federal safety standards, we must next determine whether it was appropriate for the United States District Court to issue an injunction against further state court proceedings. The Railroad urges that the preliminary injunction was proper under either of two exceptions to the Anti-Injunction Act, 28 U.S.C.A. § 2283, which provides as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

First, the Railroad says that this injunction is needed in aid of the federal court's jurisdiction *and* to protect or effectuate its judgment. Secondly, the Railroad argues that the injunction is "expressly authorized by Act of Congress" in passing the federal pre-emptive legislation, *citing Mitchum v. Foster*, 1972, 407 U.S. 225, 92 S.Ct. ____, 32 L.Ed.2d 705. Finding the first alternative to be applicable, we pretermit consideration of the second.

In *Tampa Phosphate RR v. Seaboard Coast Line RR.*, 5 Cir. 1969, 418 F.2d 387, and *Woods Exploration & Production Co. v. Aluminum Co. of America*, 5 Cir. 1971, 438 F.2d 1286, this Court wrote at great length on the state of the law regarding federal court injunctions against state court proceedings. In the latter case we thought that we had "at last reached the end of our long and protracted journey through the Appling Field and points beyond," 438 F.2d at 1316, but the importance of the issue justifies a few additional words.

The Anti-Injunction Act expressly excepts stays necessary in aid of the court's jurisdiction or needed to protect or effectuate its judgments. Here, both precepts appear, for the United States District Court still has before it part of the controversy between these parties — the judicial review of the Report — and the court has already finalized a judgment pursuant to Rule 54(b) as to part of the controversy. In effect, the court below has by final judgment held that the Railroad cannot properly be subjected to the efforts of these individual local officials to impose some safety

standard that lies outside of the Federal Railroad Safety Act of 1970. That part of the action is concluded and certainly rises to the level of *res judicata* effect that was our central concern in *Woods Exploration & Production Co. v. Aluminum Co. of America, supra.* We find that the *Woods Exploration and Tampa Phosphate RR.* cases control and we hold that this injunction was proper. Those two cases are so directly in point that it would serve little purpose to quote from them at length; instead, we merely reiterate that a federal court may enjoin a state proceeding that is precluded under the doctrine of *res judicata.* While § 2283 was designed to ensure the state courts' adjudicative potency, its exceptions assure that the federal courts and their judgments will not be eunuchized and that their muscularity will not be atrophied.

Although the character of the person *filing* the federal action does not control the issue, we cannot ignore the fact that here it was the Parish Officials themselves who invoked the jurisdiction of the federal court. This is not a case of parties racing to the courthouse or racing to judgment, nor is this a case of parties suing each other in separate state and federal courts and then encouraging jealous cross-fire between the courts. None of those factors being present, many of the thorny considerations usually involved in these injunction cases are not even raised. Appellants themselves issued the invitations to dance in the federal ballroom, they chose their dancing partners, and at their own request they were assigned a federal judge as their choreographer. Now that the dance is over, appellants find themselves unhappy with the judging

of the contest. They urge us to reverse and declare that "Good Night Ladies" should have been played without the partial summary judgment having been granted and without the preliminary injunction having been issued. This we have declined to do, and in so doing we note that this is not The Last Tango for the Parish. Appellants still have an encore to perform and their day in court is not yet over. Their attack on the Report issued by the Federal Railroad Administration has yet to be decided. The Railroad Safety Act makes clear, however, that seeking judicial review of the Report's determination that the Railroad meets all applicable standards is the only remedy even arguably available to these particular individuals. See 45 U.S.C. § 432. The *State* may participate in regulating railroad safety under the Act, *see* 45 U.S.C. §§ 435, 436, 439(a), but this case does not involve the State itself. Here we have individuals, representing a parish, waltzing into two courts simultaneously.

The trial court's holding that the Act is pre-emptive is correct. No attempt to regulate the safety of interstate railroads may be made unless the Act itself authorizes or allows the regulation. We hold that the court below properly rendered judgment that the Railroad could not be forced to participate in this state court cotillion, which was not brought by the State and which sought to impose safety measures that were not contemplated by the Act, and that the federal court, under the facts of this case, was the sole director of the terpsichorean exhibition and had the right to effectuate and

protect its directional decisions. The adjudication having gravitated to the federal forum, appellants' attempt to repeal that law is unavailing.

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

EXHIBIT "D"

U.S. COURT OF APPEALS
FILED
APR 4 1973
EDWARD W. WADSWORTH
CLERK

No. 72-1546

THOMAS A. DONELON,
CHARLES J. EAGAN, JR., ET AL,
Plaintiffs-Appellants,

versus

NEW ORLEANS TERMINAL COMPANY and
FEDERAL RAILROAD ADMINISTRATION OF
THE DEPARTMENT OF TRANSPORTATION,
Defendants-Appellees,

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(APRIL 4 , 1973

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.